Supreme Court, U. S.
FILED
DEC 27 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1011

==========

CORTES RANDELL,

Petitioner

VS

GORDON K. BANZHOFF, JR.,

Respondent

==========

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

CALVIN M. WHITESELL
Attorney for Petitioner

771 South Lawrence Street
P.O. Box 2450
Montgomery, Alabama 36103

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. _____

==========

CORTES RANDELL,

Petitioner

VS

GORDON K. BANZHOFF, JR.,

Respondent

==========

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF ALABAMA

This petition seeks the review of this Court of the decision of the Supreme Court of Alabama, reported September 28, 1979, at 78-400, Cortes Randell v. Gordon K. Banzhoff wherein the Supreme Court of Alabama,

interpreting the Alabama Rules of Civil Procedure Rule 4.2., imputed minimal contacts.

It is the Petitioners position that the application by the Alabama Supreme Court of the evidence in this case to Rule 4.2 is a clear violation of the rights secured to the petitioner by the fourteenth amendment to the Constitution of the United States as stated by this Court in McGee v. International Life Insurance Co 355 US 220, and as expanded in personam jurisdiction by this Court in Hanson v. Denckla, 35 U.S. 235, 78 S.Ct. 1228, 2 L Ed 1283.

This petitioner asserts to this Court that the test of minimal contacts by the petitioner with the State of Alabama is not shown in the record below and petitioner has therefore been denied the Constitutional protection afforded him and has no recourse except by review of this Court.

A. OPINION BELOW

The Supreme Court of Alabama rendered a decision on appeal by this petitioner from a decision by a lower court, the Circuit Court of Montgomery County, Alabama, on August 31, 1979. The Petitioner filed an application for rehearing asserting that the petitioner had not had minimal contacts with Alabama so as to subject him to the jurisdiction of Alabama Courts. The Court, without citing any evidence on rehearing, overruled the application and extended it's opinion on September 28, 1979.

Copies of the Court's opinions are appended to this petition.

B. GROUNDS OF JURISDICTION

The judgment and opinion of the Supreme Court was entered on September 28, 1979, as to the application for rehearing in this cause.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §2101 and 28 U.S.C. 1257(3).

C. QUESTIONS PRESENTED

1. Where the record fails to disclose any personal contact with a state so as confer personam jurisdiction, is contact by a corporation for which the individual is employed imputed to such individual so as to satisfy the requirements of due process.

2. Does the Alabama Rule of Civil Procedure, Rule 4.2, prescribe sufficient Constitutional safeguards on it's face so as to meet the requirements of "fair play" as intended by the Constitution.

3. When the questions presented in 1 and 2 are taken together do they meet the standard required in Hanson v. Denckla 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed., 1283.

D. CONSTITUTIONAL PROVISIONS INVOLVED

There are no statutes involved other than the Alabama Rules of Civil Procedure, and in particular Rule 4.2, and the Fourteenth Amendment to the Constitution of the United States.

A. Rule 4.2 Sufficient Contacts. A person has sufficient contacts with the State when that person, acting directly or by agent, is or may be legally responsible as a consequence of that person's

(a) transacting any business in this State;

(b) contracting to supply services or goods in this State;

(c) causing tortious injury or damage by an act or omission in this State including but not limited to actions arising out of the ownership, operation or use of a motor vehicle, air craft, boat or water craft in this State ...

(I) otherwise having some minimum contracts with this State and, under the circumstances, it is fair and reasonable to require the person to come to this State to defend an action. The minimum contacts referred to in this subdivision (I) shall be deemed sufficient, not withstanding a failure to satisfy the requirements of subdivisions (a) - (h) of this subsection 2, so long as the prosecution of the action against a person in this State is not inconsistent with the Constitution of this State or the Constitution of the United States.

b. XIV Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Randell was an employee of International Trade Exchange, hereafter referred to as I.T.E., and at all times he was a resident of Virginia. Banzhoff was a franchisee of I.T.E. in Alabama operating out of Birmingham, Alabama. Banzhoff agreed to buy an additional franchise in Florida but found he was not going to be able to operate it. He asked Randell, as an employee of I.T.E. to help him dispose of this franchise, the conversation taking place outside of Alabama. Randell, without any remuneration to himself, agreed to try to help Banzhoff

dispose of it and thought he had done so. When the sale fell through, Banzhoff found I.T.E., but not through Randell, had put another franchisee in his place in Florida. The record discloses that I.T.E. mailed a newsletter into Alabama, ran ads for franchisees, made numerous telephone calls into the State and used a number of other methods of making contact with Alabama. The record does not disclose contact by the individual Randell.

Both were sued by Banzhoff alleging misrepresentation or fraud in Montgomery County, Alabama, and a judgment granting punitive damages was rendered both against I.T.E. and petitoner Randell. Randell appealed to the Supreme Court of Alabama asserting that there was no jurisdiction over him in violation of the Fourteenth Amendment. I.T.E. did not appeal. The Supreme Court

found minimal contacts by I.T.E. and from all that the opinion discloses, imputed these contacts to Randell individually without in any way stating wherein any evidence disclosed contacts with Alabama by Randell.

REASONS FOR GRANTING THE PETITION

I. The petition should be granted because the holding by the Court below based on the record in this case is contrary to this Court's holding in Hanson v. Denckla, 35 U.S. 235, 78 S.Ct. 1228, 2 L Ed 1283.

In the instant case, there are no contacts by the petitioner in an individual capacity yet Alabama has asserted jurisdiction over his person and required him to come to Alabama and expend his property in his defense. This case is a clear violation of the basic tenets of "fair play" so often enunciated by this Court.

II. The Alabama Rules of Civil Procedure on their face violate the Fourteenth Amendment of the Constitution of the United States.

There is no provision within the Rules of Civil Procedure wherein a non-resident may produce evidence or show the lack of evidence to hold a person subject to the jurisdiction of the Alabama courts prior to trial. At the trial and upon consideration of evidence there adduced, the Court determines jurisdiction and may, as it did in this case, withhold a ruling until the non-resident has gone forward with his defense.

Is this "fair play"? Is it due process? If it was a criminal case, the Court would be in the position of trying the person before ruling on a search warrant or any other matters which motions may touch upon. This is clearly unjust and a denial of very basic rights.

This Court is respectfully asked to grant this petition and review and reverse the decision below.

Respectfully submitted,

CALVIN M. WHITESELL
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Petition for Writ of Certiorari upon the Honorable Ira DeMent, attorney for Respondent, by delivering a copy of the same to his office at 555 South Perry Street, Montgomery, Alabama, 36104, his last known address, on this the 27th day of December, 1979.

CALVIN M. WHITESELL

THE STATE OF ALABAMA---------- JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1979

Cortes Randell

78-400 V.

Gordon K. Banzhoff, Jr.

Appeal from Montgomery Circuit Court

MADDOX, JUSTICE.

Plaintiff-appellee, Gordon K. Banzhoff, a franchisee of a corporation doing business in several states, obtained a judgement against the corporation and the appellant, the corporation's former director of licensing, in the amount of $26,500, on his suit for fraud.

Apellant Cortes Randell is the only defendant who appealed. He urges three grounds of error: (1) That the trial court did not have jurisdiction over him; (2) That the evidence failed to show an actionable case of fraud and deceit; and (3) That the trial court erred in assessing punitive damages under the facts and proof. Upon due consideration, we are of the opinion that appellant's contentions lack merit; and the judgement rendered on the findings made by the

trial court, sitting without a jury, is due to be affirmed.

Briefly, the facts are as follows:

Appellee, the franchisee, originally instituted this action in fraud and deceit against the appellant individually and as agent for International Trade Exchange, a District of Columbia corporation, which was also made a defendant, but which did not prosecute an appeal. I.T.E. organizes various local "exchanges", which, in turn, solicit businesses and professional persons to join in and participate in a system by which goods and services are "bartered" between members. The local exchanges, which are franchised operations, act as clearinghouses for this barter activity, and charge a percentage as membership fees; I.T.E., in turn, sells franchises and collects fees and royalties, while providing training, computer, and other services to member franchises.

In September, 1977, appellee Banzhoff and one Rhodes entered into an agreement with I.T.E. headquarters in Virginia by which he and Rhodes would purchase the I.T.E. franchise for Birmingham, Alabama, area, one of three such "territories" in Alabama. This deal was

consummated, and appellee still operates the Birmingham franchise. There was some dispute as to whether appellee was in default on his agreements with I.T.E. concerning the Birmingham franchise, but the disagreement is not important here. In late January, 1978, appellee and Rhodes again entered into negotiations with I.T.E through its president, one Dyer, and the appellant, Randell, who was at the time, Director of Licensing, whereby they agreed to purchase the Orlando, Florida, franchise. The terms were $10,000 down payment, $15,000.00 due one month later and $15,000 due sixty days after the second installment. There was a dsipute as to whether the third installment was due thirty or sixty days later, but appellant agreed that it could have been sixty. The down payment and the first installment were both paid, but the third installment never was.

At some point in time, Rhodes assigned his share in the enterprises to appellee; when this occurred, appellee testified he began to doubt his ability to actually administer the Orlando operation without a partner. In any event, the Orlando operation never was actually set up by appellee, and never operated under his ownership.

Appellee testified that he contacted appellant in May, 1978, and requested the appellant sell the Orlando franchise for him. He claimed that the appellant agreed and that in June, 1978, he had a buyer for the franchise, one Graves, and that the appellee would be refunded a good portion of his original purchase price for the Orlando operation which was a company policy to avoid lawsuits by disgruntled ex-franchisees, according to appellant Randell. This money was not forthcoming, despite a later assurance in late June that the funds would be forthcoming from a South Carolina deal. Appellee testified that he later found out by accident that one Sutter was running an Orlando franchise, and that he had been doing so since early June. Appellee also stated that he did not pay the last payment of $15,000 because this coincided with the negotiations with appellant Randell about the sale of the franchise and that he had not tried to sell the franchise himself, relying instead on the appellant's representations.

Appellant testified that the appellee was in default, that his franchise in Orlando had been terminated in

mid-May, 1978, and that he (appellee) had been informed that the franchise would be re-licensed because the appellee had not set up operations there. Appellant denied ever having promised or represented that he would sell the Orlando franchise, but admitted that it was a company policy to refund a large portion of the franchise fees to those franchisee. who could not go through with the operation of a franchise. The trial court, at the close of the testimony found for the appellee, and denied appellant's recovery on a counterclaim for the breach of the license agreement.

THE TRIAL COURT HAD JURISDICTION

Appellant's initial contention is that the trial court lacked jurisdiction over the defendants, because neither defendant had sufficient "minimum contacts" with this state to justify being subjected to jurisdiction. This contention is without merit.

The evidence shows that I.T.E. franchised appellee by means of a mailed contract; that I.T.E. advertised and solicited business in various newspapers, circulated a trade newsletter, and maintained a toll-free line into its Virginia offices; that I.T.E. performed all

services and mailed statements from its headquarters; and that I.T.E. was admittedly profitting from the activities of the branches through "license fees" and royalties". This pattern of activity is sufficient "minimum contact" within Alabama. Cf. Mann v. Frank Hrubetz & Co., Inc., 361 So.2d 1021 (Ala. 1978); Tibbets v. Home State Savings Association, 362 So.2d 844 (Ala. 1978)

SHOWING OF FRAUD

Appellant secondly contends that appellee failed to show an actionable case of fraud and deceit. It is, of course, axiomatic that where the trial court hears testimony ore tenus, that the trial court's verdict will have the effect of a jury verdict and will not be disturbed on appeal unless "plainly and palpably wrong." Hill v. Abyssinia Missionary Baptist Church, 370 So.2d 844 (Ala. 1978).

There is sufficient evidence to support the trial court's finding of fraud and deceit as defined by Sections 6-5-101 and 6-5-103, Code 1975.

Taking the facts in a light favorable to the appellee, he showed the appellant represented that he

would sell the franchise; that he stated that, in fact, he had a buyer for the franchise; that, in fact, another franchise had been sold earlier to another investor in the Orlando area; that appellee relied on the representation to sell, and did not attempt to sell himself; that appellee is now damaged in that he is unable to sell the franchise without informing a prospective buyer that another franchise already exist in that area. The evidence was sufficient to show legal fraud or deceit. International Resorts, Inc. v. Lambert, 350 So.2d 391 (Ala. 1977). This proof is sufficient to support the finding by the trial court of fraud and deceit by appellant in this transaction.

Appellant contends that the representation, if made, was at best only an opinion of appellant, and not actionable as a material existing fact. This argument may be disposed of by the words of this Court in Shepherd v. Kendrick, 236 Ala. 289, 181 So. 782 (1938):

> "'It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of fact... If the facts are

not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of material fact, for he impliedly states that he knows the facts which justify his opinion.'"

Quoting, Kefuss v. Whitely, 220 Mich. 67, 189 N.W. 76 (1922); see also, Scholz Homes, Inc. V. Hooper, 287 Ala. 628, 254 So.2d 328 (1971). In the instant case, any "opinions" of appellant in this regard were reasonably treated by appellee as existing facts. Cf Fidelity & Casualty Company of New York v. J.D. Pittman Tractor Company, 244 Ala. 354, 13 So.2d 669 (1943).

PUNITIVE DAMAGES

Appellant's final argument is that the trial court was not justified in awarding any punitive damages to appellee under these facts. Appellee had claimed compensatory damages of $25,000. The judgement rendered was in an amount of $26,500. The award of punitive damages is largely discretionary in the court or jury. Winn-Dixie Montgomery, Inc. v. Henderson, 353 So.2d 1380 (Ala. 1977). In misrepresentation cases, however,

"they are usually restricted to instances where there is not only a knowing misstatement, but where the fraud is also gross, oppressive, or aggravated." Proctor Agency, Inc. v. Anderson, 358 So.2d 164(Ala . 1978). As to this latter standard, this Court has stated that "if the evidence tends to establish an intent to deceive and defraud, it is difficult to see but that a fraud was committed grossly." Hall Motor Company v. Furman, 285 Ala. 499, 234 So.2d 37 (1970). Here, there was sufficient evidence from which the trial court coulr have reasonably concluded that the misrepresentations made by appellant were made with "legal malice, willfulness, or reckless disregard," Loch Ridge Construction Company, Inc. v. Barra, 291 Ala. 312, 280 So.2d 745 (1973). We do not find the trial court abused its discretion in awarding punitive damages. The judgment is due to be affirmed.

AFFIRMED.

Torbert, C.J., Jones, Shares and Beatty, JJ., concur.

78-400

Randell v. Banzhoff

ON REHEARING

MADDOX, JUSTICE.

Counsel for appellant, Randell, in his application for rehearing, contends that while the evidence may have shown that the corporation, I.T.E., had "minimal contacts" with Alabama, that the evidence wholly failed to show wherein the Appellant individually had any minimal contact with Alabama. He cites Thames v. Gunter-Dunn, Inc., 373 So.2d 640 (1979), in support of his application.

In Thames, this Court did hold that "jurisdiction over individual officers or employees of a corporation cannot be predicated merely upon jurisdiction over the corporation itself." This Court said that "there must be a showing that the individual officer engaged in some activities that would subject him to the state's long-arm statute before in personam jurisdiction can attach."

We have re-examined the evidence, and we are convinced that there is sufficient evidence to show that

Alabama courts ac quired personal jurisdiction over the appellant, Randell.

OPINION EXTENDED; APPLICATION FOR REHEARING OVERRULED.

Torbert, C. J., Jones, Shores and Beatty, JJ., concur.

AUGUST 31, 1979

THE STATE OF ALABAMA - - - - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

SPECIAL TERM 1979

78-400

CORTES RANDELL

VS. MONTGOMERY CIRCUIT COURT
#CV-78-1133-T

GORDON K. BANZHOFF, JR.

ORDER

This cause having been duly submitted on briefs, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the Circuit Court be affirmed.

IT IS FURTHER ORDERED AND ADJUDGED that the Appelland, Cortes Randell, and Calvin M. Whitesell, surety for the costs of appeal, pay the costs of appeal as provided by the Alabama Rules of Appellate Procedure. And it appearing that said parties have waived their rights of exemption under the laws of Alabama, IT IS ORDERED that execution issue accordingly.